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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO / OAKLAND DIVISION**

TRISH GILES,) Case No.: 4:15-cv-3803
)
Plaintiff,) **COMPLAINT (ERISA)**
)
v.)
)
KAISER EMPLOYEE MEDICAL HEALTH)
PLAN, KAISER PERMANENTE)
SUPPLEMENTAL MEDICAL PLAN,)
KAISER FOUNDATION HEALTH PLAN,)
INC.,)
Defendants.)

INTRODUCTION

1. This case challenges Defendants Kaiser Employee Medical Health Plan and Kaiser Permanente Supplemental Medical Plan (collectively the “Plans”) and Defendant Kaiser Foundation Health Plan, Inc.’s denials of benefits due under the terms of the Plans for medically necessary treatment for Plaintiff Trish Giles’ life-threatening condition of sebaceous carcinoma by qualified physicians outside of the Kaiser Permanente (“Kaiser”) health care system—even though Kaiser had demonstrated a pattern of incompetence and malpractice in misdiagnosing and

1 repeatedly failing to adequately treat Plaintiff's rare and life-threatening condition.

2
3 **JURISDICTION**

4 2. Plaintiff brings this action for declaratory, injunctive, and monetary relief
5 pursuant to section 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974
6 ("ERISA"), 29 U.S.C. § 1132(a)(1)(B). This Court has subject matter jurisdiction over
7 Plaintiff's claim pursuant to ERISA § 502(e) and (f), 29 U.S.C. § 1132(e) and (f), and 28 U.S.C.
8 § 1331.

9 **VENUE**

10 3. Venue lies in the Northern District of California pursuant to ERISA § 502(e)(2),
11 29 U.S.C. § 1132(e)(2), because the ERISA-governed plan at issue were administered in part in
12 this District and can be found in this District. Moreover, Defendant Kaiser Foundation Health
13 Plan, Inc.—the named Plan Administrator for the Plans—is headquartered in this District.

14 **INTRADISTRICT ASSIGNMENT**

15 4. This case should be assigned to the San Francisco / Oakland Division because
16 Defendants may be found within this division.

17 **PARTIES**

18 5. At all relevant times, Plaintiff was a participant, as defined by ERISA § 3(7), 29
19 U.S.C. § 1002(7), in the Plans.

20 6. At all relevant times, Defendants Plans were employee welfare benefit plans
21 within the meaning of ERISA § 3(1), 29 U.S.C. § 1002(1).

22 **FACTS**

23 7. Under the terms of the Plans, Plaintiff was entitled to health care benefits and
24 coverage (including but not limited to reimbursement of health care expenses and related travel
25 expenses) for medical services and/or treatment provided by medical providers outside of Kaiser
26 if such services and/or treatment is "medically necessary".

27 8. In February 2011, Plaintiff was suffering from dropping eyelids and blurry vision

1 and sought treatment from Kaiser's Sacramento facility. Kaiser's doctors observed a lesion on
2 Ms. Giles' conjunctiva of her left cornea, but erroneously thought it was due to MRSA. Kaiser
3 did 2 scrapings of this lesion of this lesion and sent them to Kaiser's pathology department, but
4 it was never tested for sebaceous cell carcinoma, which Plaintiff was diagnosed as having on
5 January 8, 2013 by a pathologist outside of Kaiser.

6 9. Sebaceous carcinoma is an extremely rare disorder, which arises from the
7 sebaceous glands of the eye, accounting for only 0.2-0.7% percent of all eyelid tumors and 5% of
8 all eyelid malignancies. Sebaceous carcinoma is a potentially deadly disease with a high degree
9 of recurrence and metastasis, as some authorities have stated a 33% recurrence rate and 25% rate
10 of metastasis and a 10% mortality rate. Sebaceous carcinoma is also difficult to identify and is
11 difficult to diagnose. Given the rare and deadly nature of the disease, and the difficulty in
12 detection and treatment, it is absolutely crucial that patients with this disease be treated by
13 physicians with specialized expertise in this disease.

14 10. On October 31, 2012, Kaiser physician corneal specialist Mary Bell Moore, M.D.,
15 performed a conjunctival biopsy of the lesion on Ms. Giles' left eye. Dr. Moore gave specified
16 written instructions to Kaiser's pathology department that the biopsy slides/samples to be sent
17 directly to Dr. George Harocopos, M.D. of Washington University, a recognized ocular
18 pathologist.

19 11. Kaiser's pathology department failed to detect the carcinoma from the biopsy,
20 claiming a diagnosis of stromal fibrosis. And despite Dr. Moore's explicit instructions, Kaiser
21 failed to send the biopsy samples to Dr. Harocopos for two months, sending them on December
22 26, 2012. Dr. Harocopos only received one slide from Kaiser on December 27, 2012, while five
23 unstained slides were not received until January 2, 2013.

24 12. On January 8, 2013, Dr. Harocopos issued a report confirming that the biopsy
25 obtained of Plaintiff's lesion was positive for sebaceous cell carcinoma, with a pattern
26 characteristic of pagetoid invasion of the ocular surface epithelium." Only after receiving Dr.
27 Harocopos' report did Kaiser admit its error and adopt Dr. Harocopos' diagnosis of sebaceous

1 cell carcinoma on January 11, 2013. Kaiser's inexcusable delay in sending the biopsy tissue
2 sample not only delayed the diagnosis by competent ocular pathologist, it also resulted in the
3 tumor developing for two months more than it should have, worsening Plaintiff's treatment
4 prospects.

5 13. Following the diagnosis of sebaceous carcinoma, on January 31, 2013, Plaintiff
6 consulted with Kaiser oculoplastic surgeon, Arthur Glover, M.D. Dr. Glover discussed a
7 consultation with physicians at the Wills Eye Institute in Philadelphia (including but not limited
8 to Jerry Shields, M.D. and/or Carol Shields, M.D.), stating "they [Wills] have the most
9 experience in the country" regarding sebaceous carcinoma.

10 14. The physicians at Wills Eye Institute ("Wills") are nationally recognized as
11 experts and pioneers in the treatment of patients with sebaceous carcinoma.

12 15. Yet inexplicably following this consultation and after additional mapping biopsies
13 were positive for sebaceous carcinoma, Dr. Glover refused to grant a referral to Wills.
14 Moreover, on March 8, 2013, Defendants denied Plaintiff's request for a referral to Wills.
15 Plaintiff was put in a position that if she wanted to pursue medically necessary treatment, she
16 would have to do so out-of-pocket, even though it was obvious that Kaiser was incapable of
17 providing medically necessary treatment for her condition.

18 16. From March 4, 2013 through May 1, 2013, Ms. Giles received treatment for her
19 condition from physicians at Wills, including Wills ocular oncologist Sara Lally, M.D., as well
20 as physicians from Thomas Jefferson University Hospital ("Jefferson"), including ENT surgeon
21 Joseph M. Curry, M.D. and oncologist Rita S. Axelrod, M.D. Drs. Lally, Curry and Axelrod are
22 recognized experts in the treatment of patients with sebaceous carcinoma.

23 17. On May 7, 2013, Plaintiff met with Kaiser oncologist Edward Hearn, M.D., who
24 told Plaintiff that Kaiser's Oncology Department "has nothing to offer as far as treatment of
25 follow up" due to Kaiser's lack of experience with Ocular Sebaceous Cell Carcinoma. The next
26 day, Plaintiff had a telephone conference with Kaiser ocular oncologist Isabella Phan, M.D.
27 During that conference, Dr. Phan stated that she would have referred Plaintiff outside of Kaiser,

1 given Kaiser's lack of expertise in this condition and stated that Plaintiff was receiving the best
2 possible care at Wills and that she needed to continue treatment at Wills.

3 18. It was only after this telephone conference that Defendants sent a letter dated June
4 5, 2013 and finally agreed to reimburse Plaintiff for the out-of-pocket health care expenses and
5 travel expenses that she had incurred from March 2013 through May 2013.

6 19. Plaintiff continued her treatment with her doctors at Wills and Jefferson, who
7 recommended that due to the recurrence of her carcinoma despite numerous resections, that if
8 Plaintiff sought a exenteration of her eye, that she undergo a total exenteration (a procedure
9 removing all orbital tissue, including the periorbital posterior to the orbital rim and the lacrimal
10 ducts), along with cryotherapy (given the pagetoid spread of her sebaceous carcinoma) and a
11 biopsy of her margins by an ocular pathologist to decrease the incidence of occurrence.

12 20. Despite its previous pattern of incompetence in diagnosing and treating Plaintiff's
13 condition, Kaiser's doctors insisted that Plaintiff receive her exenteration by Kaiser "in-house"
14 doctors and recommended two Kaiser surgeons, Sang Oh, M.D. and Hossein Saadati, M.D. Both
15 Drs. Oh and Saadati lacked the necessary experience to perform the total exenteration procedure,
16 both insisting that Plaintiff undergo a partial exenteration instead. Both Drs. Oh and Saadati
17 refused to authorize cryotherapy or have a ocular pathologist review the frozen biopsy sections.

18 21. Understandably concerned about the complete lack of expertise demonstrated by
19 Drs. Oh and Saadati, Plaintiff requested an expedited referral to Wills for exenteration on
20 January 28, 2014, noting Kaiser's mishandling of the biopsies taken on October 31, 2012. On
21 January 31, 2014, an unnamed Physician Reviewer approved the referral and stated: "The
22 recommendation now is for exenteration surgery of the left eye. Member is requesting to get this
23 procedure done at Wills Eye Institute. After review of the medical records and discussion with
24 Dr. XXXX and Dr. YYYY the procedure for exenteration is the more definitive procedure for
25 management of the Sebaceous Carcinoma. The recommendation is that while this procedure can
26 be done in plan it is more appropriate to have this procedure done at the same institute where
27 care has been provided for the last several months. *The plan will be to transition care back to in*

1 *plan after the exenteration. Plan will be approve the surgery at Wills Eye Institute and one*
2 *follow up visit.”* (Emphasis added).

3 22. On February 6, 2014, Plaintiff underwent the total exenteration at Wills. The
4 pathology report of the biopsy revealed that the total exenteration was the medically necessary
5 procedure, because residual sebaceous carcinoma involving the corneal epithelium and the lining
6 of the lacrimal sac, which was also removed during the total exenteration. The report also noted
7 “*relatively extensive involvement of the lining epithelium of the lacrimal sac by tumor seen*
8 *within the epithelium and the lumen of the sac.*” Thus, if Plaintiff had undergone the partial
9 exenteration recommended by Kaiser, the tumor on her lacrimal sac would not have been
10 diagnosed or found and it would have progressed undiscovered with potentially deadly results.

11 23. On February 28, 2014, Plaintiff met with Wills physician Dr. Lally, who
12 recommended that given the spread of the cancer to the lacrimal sac and the risk of it spreading
13 into her nasal cavity, the following measures should be taken: 1) referrals to Drs. Curry and
14 Axelrod as well as Jefferson radiologist Pramila Anne, M.D., all of whom specialized in the
15 treatment of head and neck cancers; 2) exploratory endoscopic surgery in the nasal cavity to
16 ensure that the cancer had not spread to the nasal cavity; and 3) radiation therapy and
17 chemotherapy to Plaintiff’s sinus cavity.

18 24. All of the services recommended by Dr. Lally were “medically necessary” and as
19 such should have been covered by the Plans. Yet when Plaintiff met with Kaiser ENT oncologist
20 Jason Kim, M.D. and radiologist Nathalie Nguyen, M.D., Drs. Kim and Nguyen refused to
21 authorize the referral to the Wills and Jefferson doctors for the treatments prescribed by Dr.
22 Lally. Instead, Dr. Kim refused to authorize endoscopic surgery claiming the “benefit of surgery
23 is not known at this time” and Dr. Nguyen refused to authorize radiation therapy to Plaintiff’s
24 sinus cavity, only recommendation radiation to the “left eye/tumor bed” and draining the
25 lymphatic system, even though Dr. Nguyen admitted that Plaintiff had “aggressive cancer and
26 incidences of regional lymphatic involvement is high.”

27 25. On March 7, 2014, Plaintiff consulted with Dr. Hearn who once again
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1 acknowledged Kaiser's lack of experience in treating Plaintiff's condition, and deferred to the
2 recommendations of Dr. Lally and Dr. Axelrod regarding treatment. As such, Dr. Hearn
3 attempted to obtain a referral to Dr. Axelrod for the treatment prescribed by Dr. Lally, but in a
4 letter date March 13, 2014, Defendants denied Dr. Hearn's referral request claiming that it was
5 not medically necessary to receive services outside the Plan, with no further explanation. The
6 March 13, 2014 letter was an adverse benefit determination within the meaning of section 503 of
7 the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1133, and the Secretary
8 of Labor's regulations thereunder at 29 C.F.R. § 2560.503-1(m)(4) because it was a "denial" and
9 a "failure to provide or make payment of" a "benefit."

10 26. Given the medically necessary nature of the treatment prescribed by Drs. Lally
11 and Axelrod and given the pattern of incompetence and inadequate treatment provided by Kaiser
12 physician for her condition, starting in March 2014 Plaintiff traveled to Philadelphia and began
13 treatment in line with the treatment recommendations of Drs. Lally and Axelrod, including but
14 not limited to: 1) endoscopic sinus surgery with Dr. Curry on March 19, 2014, with biopsy
15 samples of her nasal sidewall and lacrimal duct; and 2) a March 18, 2014 consultation with Dr.
16 Anne who recommended high-dose radiation to Plaintiff's eye-tumor bed, nose, sinus area as
17 well as draining the lymphatic system. Dr. Anne reported to Kaiser that "in order to allow
18 comprehensive care and continuity of care for her rare tumor, we request that she be allowed to
19 receive her radiation therapy here at Thomas Jefferson."

20 27. On March 26, 2014, Plaintiff submitted a request for expedited referral for
21 comprehensive treatment for recurrent sebaceous cell carcinoma with Jefferson and Wills,
22 confirming the medical necessity of pursuing a coordinated plan of treatment of surgery,
23 chemotherapy and radiation therapy that focused on the nasal area as well as the eye and the
24 orbit, given the spread of the cancer to the lacrimal sac.

25 28. On March 31, 2014, Defendants denied Plaintiff's March 26, 2014 request for a
26 referral, absurdly stating that "it is advised that you discuss additional surgery with Dr. Kim,
27 ENT Surgeon at the Kaiser Permanente Medical Center"—the same Dr. Kim who refused to
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1 perform the requested surgery in the first place. The March 31, 2014 letter was an adverse
2 benefit determination within the meaning of section 503 of the Employee Retirement Income
3 Security Act (“ERISA”), 29 U.S.C. § 1133, and the Secretary of Labor’s regulations thereunder
4 at 29 C.F.R. § 2560.503-1(m)(4) because it was a “denial” and a “failure to provide or make
5 payment of” a “benefit.”

6 29. Given the danger of the cancer spreading and causing irreparable harm, and the
7 medical necessity of pursuing the treatment course recommended by the doctors at Wills and
8 Jefferson, Plaintiff was forced by Defendants’ denials to pay hundreds of thousands of dollars in
9 health care and travel expenses out of pocket to pursue treatment from April through June 2014,
10 as well as in October 2014 and afterwards, including an extensive course of chemotherapy and
11 radiation therapy as recommended by Drs. Lally, Anne and Axelrod, even though the Plans were
12 obligated to cover such expenses for medically necessary treatment.

13 30. On July 21, 2014, Ms. Giles contacted Defendants to request a retroactive referral
14 to Wills for oncology services related to her condition of sebaceous carcinoma. An Investigative
15 Review by an unnamed reviewer for Defendants stated, “We have the specialists to take care of
16 her; she has a personal preference for the doctors in Philadelphia but we have the expertise to
17 take of her” despite the voluminous evidence of the lack of expertise and incompetence shown
18 by Kaiser doctors in treating Plaintiff’s condition. The Investigative Review also contained the
19 adversarial statement in response to the question of whether there were “any alternative
20 recommendations for this member”, stating “She can have her care with us or she can change
21 health plans.”

22 31. On August 20, 2014, Defendants sent a letter to Plaintiff denying her request for a
23 retroactive referral, claiming that her requested care is “available in-Plan” and stating that its
24 previous referral to Wills was only “for the removal of your eye”. The March 31, 2014 letter
25 was an adverse benefit determination within the meaning of section 503 of the Employee
26 Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1133, and the Secretary of Labor’s
27 regulations thereunder at 29 C.F.R. § 2560.503-1(m)(4) because it was a “denial” and a “failure
28

1 to provide or make payment of” a “benefit.”

2 32. Plaintiff timely appealed the March 13, 2014, March 31, 2014 and August 20.,
3 2014 adverse benefit determinations and provided to Defendants voluminous medical evidence
4 showing that the requested medical services by the out-of-network doctors at Wills and Jefferson
5 were medically necessary and therefore were required to be covered by the Plans, especially in
6 light of Kaiser’s pattern of incompetence and lack of experience in treating Plaintiff’s condition..

7 33. Despite the overwhelming evidence establishing the medical necessity of the
8 procedures sought by Plaintiff, on November 14, 2014 Defendants upheld the March 13, 2014,
9 March 31, 2014 and August 20, 2014 denials. Plaintiff has therefore exhausted all administrative
10 remedies and under ERISA and is entitled to file a civil action under ERISA.

11 34. As a result of Defendants’ denials of her claims, Plaintiff has incurred substantial
12 out-of-pocket expenses to pay for medical services and travel expenses that are required to be
13 covered under the terms of the Plans.

14 35. As a direct and proximate result of Defendants’ actions, Plaintiff has incurred
15 substantial out-of-pocket costs to pay for medical services and travel expenses that should have
16 been covered by the Plans.

17 36. As a direct and proximate result of Defendants’ actions, Plaintiff has suffered
18 other economic losses, including having to incur attorneys’ fees to obtain the benefits provided
19 by the Plan.

20 **FIRST CLAIM FOR RELIEF**

21 **[Claim for Benefits Pursuant to ERISA § 502(a)(1)(B) Against All Defendants]**

22 37. Plaintiff incorporates Paragraphs 1 through 36 as though fully set forth herein.

23 38. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), permits a plan participant to
24 bring a civil action to recover benefits due to her under the terms of a plan, to enforce her rights
25 under the terms of a plan, and/or to clarify her rights to future benefits under the terms of a plan.

26 39. At all relevant times, under the terms of the Plans as set forth in the governing
27 plan instruments, Plaintiff was entitled to health care benefits (including but not limited to

1 reimbursement for health care expenses and related travel expenses) from the Plans for medical
2 necessary services provided by medical providers outside of Kaiser.

3 40. By denying Plaintiff's claims for benefits, and by related acts and omissions,
4 Defendant has violated, and continues to violate, the terms of the Plans and Plaintiff's rights
5 thereunder. Defendants' refusal to pay Plaintiff benefits violates the terms of the Plan, and
6 Defendants' actions in administering Plaintiffs' claim and in denying benefits were wrongful and
7 an abuse of discretion. At all material times herein, Defendants failed and refused to honor the
8 terms of the Plans.

9 41. As a proximate result of Defendant's actions, Plaintiff has been deprived of health
10 care benefits to which she was and is entitled and has suffered damages as set forth above.
11 Plaintiff further seeks a declaration as to her entitlement to future health care benefits, as follows:
12 an injunction prohibiting Defendant from again denying coverage for any medical services
13 (including reimbursement of medical expenses and/or travel expenses incurred) provided by
14 medical providers outside of Kaiser (including but not limited to medical providers from Wills
15 and Jefferson) related to Plaintiff's ongoing condition of sebaceous carcinoma.

16 **PRAYER FOR RELIEF**

17 WHEREFORE, Plaintiff prays that the Court grant the following relief:

18 A. Declare that Defendants violated the terms of the Plans by denying
19 Plaintiff's claims for health care benefits as set forth above;

20 B. Order that Defendants reimburse Plaintiff for her out-of-pocket expenses
21 incurred to pay for covered medical services and related travel expenses, with reasonable pre-
22 judgment interest thereon;

23 C. Declare Plaintiff's right to receive future medical benefits under the terms
24 of the Plans;

25 D. Issue an injunction requiring Defendants to approve future claims for
26 benefits based on Plaintiff's need for continued treatment of her life-threatening condition by
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1 medical providers outside of Kaiser, including but not limited to the medical providers at Wills
2 and Jefferson;

3 E. Award Plaintiff attorneys' fees and costs of suit incurred herein pursuant
4 to ERISA § 502(g), 29 U.S.C. § 1132(g);

5 F. Provide such other relief as the Court deems equitable and just.

6 Respectfully submitted,

7
8 Dated: August 19, 2015 BOLT KEENLEY KIM LLP

9 By: /s/ Brian H. Kim
10 Brian H. Kim
11 Attorneys for Plaintiff

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